

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KIMBERLY WILLIAMS,)	
)	No. CV-06-0347-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR AN
MICHAEL J. ASTRUE,)	IMMEDIATE AWARD OF BENEFITS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 17.) Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Franco L. Becia represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for an immediate award of benefits.

JURISDICTION

On November 16, 1999, plaintiff Kimberly Williams (Plaintiff) protectively filed applications for disability insurance benefits and Social Security Income benefits, respectively. (Tr. 179, 786.) Plaintiff alleged disability due to back and neck pain, with an onset date of October 10, 1999. (Tr. 200.) Benefits were denied initially and on reconsideration. (Tr. 89, 94.) Plaintiff

1 requested a hearing before an administrative law judge (ALJ), which
2 was held before ALJ Richard Hines on November 29, 2000. (Tr. 97,
3 801-844.) Plaintiff, who was present with a non-attorney
4 representative, testified. (Tr. 801.) The ALJ denied benefits on
5 March 21, 2001, and the Appeals Council remanded the matter for
6 additional proceedings on September 27, 2001. (Tr. 103.) A second
7 hearing was held before ALJ Hines on May 23, 2002, at which
8 Plaintiff and medical expert Glen Almquist, M.D., testified. (Tr.
9 845-46.) Plaintiff was represented by an attorney. The ALJ denied
10 benefits on December 17, 2002, (Tr. 88), and the Appeals Counsel
11 remanded the case again for further proceedings on February 27,
12 2004. (Tr. 137-39.) Additional evidence was submitted and a third
13 hearing was held on March 2, 2005, at which medical expert William
14 Spence, M.D., testified. (Tr. 860-61.) The case was reassigned to
15 ALJ R.J. Payne, and a fourth hearing was held on June 17, 2005, at
16 which medical experts Robert Stier, M.D., and Ronald Klein, Ph.D.,
17 testified. (Tr. 869-70.) The fifth and final hearing was held on
18 July 25, 2005. Plaintiff, who was represented by counsel, and
19 vocational expert Sharon Welter testified. (Tr. 894-931.) ALJ
20 Payne denied benefits on November 7, 2005, and the Appeals Council
21 denied review. The instant matter is before this court pursuant to
22 42 U.S.C. § 405(g).

23 **STATEMENT OF THE CASE**

24 The facts of the case are set forth in detail in the transcript
25 of proceedings, and are briefly summarized here. At the time of the
26 last hearing, Plaintiff was 40 years old. She had completed seventh
27 grade and obtained her high-school equivalency degree. She lived
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1 with her spouse and seven-year-old child. She also had a 24-year-
2 old son. (Tr. 897-99.) She had past relevant work as a dietary
3 aide, grocery bagger, cashier, flagger, and cannery worker. (Tr.
4 899-905, 927.) She testified she could not sustain work due to pain
5 and fatigue and mental confusion. (Tr. 905, 907, 922.)

6 **ADMINISTRATIVE DECISION**

7 At step one, ALJ Payne found Plaintiff had not engaged in
8 substantial gainful activity during the relevant time. He found she
9 was insured for benefits through December 31, 2004. (Tr. 37.) At
10 step two, he found Plaintiff had the severe impairment of pain in
11 her back, neck and hip, but determined at step three that it did not
12 meet or medically equal one of the listed impairments in 20 C.F.R.,
13 Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 31, 37.)
14 The ALJ found Plaintiff's depression was not severe. (Tr. 31-32.)
15 He determined Plaintiff's subjective complaints regarding her
16 functional limitations were not totally credible. (Tr. 33.) At
17 step four, he determined Plaintiff had a residual functional
18 capacity (RFC) for light exertion with some postural limitations and
19 nonexertional limitations due to pain. (Id.) He found even with
20 her medication, she would be able to "remain reasonably attentive
21 and responsive in a work setting and would be able to carry out
22 normal work assignments satisfactorily." He found pain would not
23 limit her ability to work. (Id.) The ALJ concluded Plaintiff could
24 perform her past relevant work as a cashier, cannery worker,
25 courtesy booth clerk and flagger. (Tr. 35.) Proceeding to step
26 five and considering vocational expert testimony, he found
27 alternatively that Plaintiff could perform other work in the
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1 national economy and was therefore not disabled. (Tr. 38.)

2 STANDARD OF REVIEW

3 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
4 court set out the standard of review:

5 A district court's order upholding the Commissioner's
6 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
7 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
8 Commissioner may be reversed only if it is not supported
9 by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
11 Substantial evidence is defined as being more than a mere
12 scintilla, but less than a preponderance. *Id.* at 1098.
13 Put another way, substantial evidence is such relevant
14 evidence as a reasonable mind might accept as adequate to
15 support a conclusion. *Richardson v. Perales*, 402 U.S.
16 389, 401 (1971). If the evidence is susceptible to more
17 than one rational interpretation, the court may not
18 substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
20 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and resolving
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
24 Cir. 1995). The ALJ's determinations of law are reviewed
25 *de novo*, although deference is owed to a reasonable
26 construction of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
requirements necessary to establish disability:

Under the Social Security Act, individuals who are
"under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only

1 unable to do his previous work but cannot, considering his
2 age, education and work experience, engage in any other
3 kind of substantial gainful work which exists in the
4 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
5 the definition of disability consists of both medical and
6 vocational components.

7 In evaluating whether a claimant suffers from a
8 disability, an ALJ must apply a five-step sequential
9 inquiry addressing both components of the definition,
10 until a question is answered affirmatively or negatively
11 in such a way that an ultimate determination can be made.
12 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
13 claimant bears the burden of proving that [s]he is
14 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
15 1999). This requires the presentation of "complete and
16 detailed objective medical reports of h[is] condition from
17 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
18 404.1512(a)-(b), 404.1513(d)).

19 It is the role of the trier of fact, not this court, to resolve
20 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
21 supports more than one rational interpretation, the court may not
22 substitute its judgment for that of the Commissioner. *Tackett*, 180
23 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
24 Nevertheless, a decision supported by substantial evidence will
25 still be set aside if the proper legal standards were not applied in
26 weighing the evidence and making the decision. *Browner v. Secretary*
27 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
28 there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

ISSUES

The question is whether the ALJ's decision is supported by
substantial evidence and free of legal error. Specifically,

1 Plaintiff argues the ALJ improperly rejected the opinions of her
2 treating and examining physicians and erroneously relied on the
3 testimony of medical experts. (Ct. Rec. 14 at 13, 15, 19.)

4 DISCUSSION

5 A. Evaluation of Medical Evidence

6 It is undisputed that Plaintiff bears the burden of proving she
7 is disabled by providing complete and detailed objective medical
8 evidence and evidence from other medical sources, of her condition
9 from licensed medical professionals and other sources. 20 C.F.R.
10 404.1512(a)-(b); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
11 1999). The administrative record shows Plaintiff received medical
12 care, pain management and/or mental health counseling from providers
13 at the Wenatchee Valley Medical Clinic, Samaritan Healthcare in
14 Moses Lake, Washington, the Shepherd's Staff Foundation Medical
15 Clinic in Deer Park, Washington, the North Basin Medical Clinic in
16 Davenport, Washington, and Stevens County Counseling Services. In
17 addition, she was examined by rheumatology specialist J. Richard
18 Newton, M.D., and psychologists Thomas McKnight, Ph.D., and John
19 McRae, Ph.D.

20 Records indicate Cole Hemmerling, M.D., treated Plaintiff at
21 Samaritan Healthcare from 1999 to 2000. (Tr. 263-310, 325.) Dr.
22 Hemmerling diagnosed depression and possible fibromyalgia in May
23 2000; he prescribed Wellbutrin for her depression and Voltaren
24 (anti-inflammatory) for pain. (Tr. 266-69.) In a RFC
25 questionnaire, Dr. Hemmerling opined Plaintiff's pain would
26 interfere "often" with her attention and concentration, she could
27 perform low stress work, could sit or stand at least 6 hours, but
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1 not continuously, and would require unscheduled breaks of five to
2 ten minutes when she would need to lie down or sit quietly. He
3 indicated her impairments would cause "good days" and "bad days,"
4 and she was likely to be absent about four times per month. (Tr.
5 315-20.) In October 2000, he referred Plaintiff to Dr. Newton for
6 a rheumatology examination. (Tr. 324.)

7 Dr. Newton ruled out metabolic conditions with objective
8 laboratory tests, the results of which are in the record, and
9 diagnosed fibromyalgia. (Tr. 325, 328-32.) He recommended treatment
10 with pain medication, muscle relaxants, sleep aides and rest. He
11 specifically noted that the pathology was not well established and
12 treatment was not always effective. (Tr. 325.)

13 In July 2001, while Plaintiff was being treated by Keith
14 Hindman, D.O., she began into a pain management program that
15 included exercise, manipulative therapy, diet monitoring and
16 medication monitoring. (Tr. 335, 324-55.) In May 2002, Dr. Hindman
17 diagnosed fibromyalgia, chronic pain syndrome, chronic fatigue
18 (which he considered objectively verified by elevations in her
19 Epstein-Barr virus antibodies) and adrenal exhaustion. He opined
20 her pain management regime was helping her, but due to pain and need
21 to rest frequently, she was unemployable. (Tr. 356.) In April 2004,
22 Dr. Hindman noted an improvement in Plaintiff's quality of life, but
23 opined she was unable to work on a sustained basis. (Tr. 393, 396.)
24 His opinion is supported by clinical notes, laboratory tests and
25 pain management reports dating from 2001 to 2005. Specifically, Dr.
26 Hindman reported Plaintiff had ongoing depression, needed to rest
27 frequently, and would experience increased pain with overexertion.

1 (Tr. 393, 406-574.) These opinions are consistent with Dr.
2 Hemmerling's opinions. Plaintiff continued treatment with Dr.
3 Hindman through March 2005.¹ (Tr. 633-709.)

4 In August 2000, Dr. McKnight completed a psychological
5 evaluation and diagnosed depressive disorder with elements of
6 anxiety. (Tr. 362.) He concluded Plaintiff could work full time,
7 based on a chart review, one-time exam and testing. (Tr. 357, 362.)

8 Plaintiff changed primary care providers in June 2003, when she
9 moved to Davenport, Washington. Rolf Panke, D.O., assessed
10 fibromyalgia, chronic pain, chronic narcotic use and somatic
11 dysfunction of the cervical, thoracic, lumbar spine. (Tr. 379,
12 385.) Dr. Panke recommended she continue to see Dr. Hindman for
13 pain management. (Tr. 777.)

14 In May 2004, Plaintiff was evaluated by Dr. McRae. Based on a
15 clinical interview and objective psychological testing, he diagnosed
16 major depression, recurrent without psychotic features, anxiety
17 disorder and personality disorder, nos. (Tr. 400-01.) He observed
18 Plaintiff as anxious and depressed with noticeable motor slowness,
19 although she showed good concentration. (Tr. 399.) He noted
20 several times that Plaintiff's condition was slowing her down, which
21 he indicated might have been due to medication. (Tr. 401.) Test
22 results indicated severe problems with auditory recall and
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24 ¹ The court takes judicial notice of Dr. Hindman's Indictment
25 in June 2007 on federal charges. *United States v. Hindman*, Cause
26 No. CR-07-096-RHW (E.D. Wa.). FED. R. CIV. P. 201. These pending
27 charges do not affect the court's deliberations in this civil
28 matter.

1 depression. However, supplemental testing showed no malingering or
2 exaggeration in visual memory. (Tr. 400.) Dr. McRae noted
3 inconsistencies in her behavior on exam and information in the
4 record. (Tr. 399, 401.) He concluded Plaintiff had several marked
5 functional limitations, including her ability to tolerate the
6 pressures and expectations of a normal work setting. (Tr. 404.)

7 The record also contains detailed counseling notes from Stevens
8 County Counseling, reflecting treatment from October 2003 until
9 February 2005, for pain issues, depression, past trauma (including
10 sexual abuse as a child, kidnaping and molestation when she was
11 five, and repeated physical abuse by her first husband). (Tr. 366-
12 78, 575-632.) From February 2004 to February 2005, Plaintiff's
13 counselor observed she had good days and bad days, she was depressed
14 and anxious, had difficulty discussing past abuse, demonstrated
15 confusion and memory problems at times, and reported episodes when
16 she slept all day. (Tr. 585, 596, 602-32.)

17 Plaintiff was taking prescribed medication for hypothyroidism,
18 depression, sleep disturbance, fatigue and pain over the course of
19 her treatment. (Tr. 240, 242, 641, 705.) In July 2005, her
20 medications were listed as thyroid, anti-depressants and opiate pain
21 medication. (Tr. 774.) She participated consistently in pain
22 management services, in compliance with the Washington State
23 Department of Health Guidelines for Management of Pain, and
24 counseling services. (Tr. 332, 365-78, 575-632.)

25 Four medical experts testified over the years in this case,
26 offering conflicting opinions regarding diagnoses and severity. In
27 May 2002, Glen Almquist, M.D., and orthopedic surgeon, testified.
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1 Dr. Almquist discounted a diagnosis of fibromyalgia because
2 Plaintiff was taking narcotic pain medication, which he considered
3 contra-indicated, and because there was no evidence of a spinal tap.
4 He also testified her exercise program was not sufficiently
5 strenuous to treat fibromyalgia and relieve the attendant depression
6 and pain. (Tr. 854.) In March, 2005, William Spence, M.D., and
7 pulmonary specialist, testified he did not recognize fibromyalgia as
8 a disease, but considered the condition a "chronic pain syndrome"
9 described under Listing 12.07 (*Somatization Disorders*). (Tr. 864.)
10 He opined Plaintiff met Listing 12.07 from the alleged date of
11 onset, due to marked difficulties in maintaining social functioning
12 and repeated episodes of deterioration or decompensation in work or
13 work-like settings. (Tr. 866-67.)

14 Internal medicine specialist Robert Stier, M.D., testified at
15 the June 16, 2005, hearing and concurred with Plaintiff's treating
16 physicians' diagnoses of fibromyalgia, referencing the
17 rheumatologist's evidence in the record that confirmed this
18 diagnosis. (Tr. 873-74.) Regarding physical limitations, Dr. Stier
19 opined Plaintiff did not meet the Listings, and was capable of light
20 work with some postural limitations. Dr. Stier did not contradict
21 Plaintiff's treating physicians' opinions that Plaintiff was unable
22 to work on a sustained basis; rather, he deferred to Dr.
23 Hemmerling's comment that "there was unpredictable worsening of the
24 symptoms that might promote absenteeism" that would occur "at least
25 four times a month." (Tr. 879-80.)

26 Non-examining psychologist Ronald Klein also testified at the
27 June 16, 2005, hearing. He stated the clinical scales on
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1 Plaintiff's psychological testing by Dr. McRae were "wildly
2 elevated," which he interpreted as gross exaggeration of symptoms.
3 (Tr. 887.) He concurred with a diagnosis of depression but
4 disagreed with the degree of severity assessed by Dr. McRae. He
5 concluded Plaintiff's mental functional limitations were mild and
6 her mental impairments were non-severe. (Tr. 765, 887, 891-92.)

7 In a disability proceeding, it is the role of the ALJ to
8 resolve conflicts in medical evidence. A treating physician's
9 opinion is given special weight because of his or her familiarity
10 with the claimant and her physical condition. See *Fair v. Bowen*,
11 885 F.2d 597, 604-05 (9th Cir. 1989). If the treating physician's
12 opinion is not contradicted, it can be rejected only with "clear and
13 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
14 1995). If contradicted, the ALJ may reject the opinion if he states
15 specific, legitimate reasons that are supported by substantial
16 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
17 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. A treating
18 physician's opinion "on the ultimate issue of disability" must
19 itself be credited if uncontroverted and supported by medically
20 accepted diagnostic techniques unless it is rejected with "clear and
21 convincing" reasons. *Holohan v. Massanari*, 246 F.3d 1195, 1202-03
22 (9th Cir. 2001).

23 To meet this burden, the ALJ can set out a detailed and
24 thorough summary of the facts and conflicting clinical evidence,
25 state his interpretation of the evidence, and make findings. *Thomas*
26 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Magallanes v. Bowen*,
27 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is not required to accept
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1 the opinion of a treating or examining physician if that opinion is
2 brief, conclusory and inadequately supported by clinical findings.
3 *Id.*

4 Courts have upheld an ALJ's decision to reject the opinion of
5 a treating or examining physician based in part on the testimony of
6 a non-examining medical advisor. *Lester*, 81 F.3d at 831. The
7 testimony of a medical expert may serve as substantial evidence only
8 when supported by other evidence in the record. *Id.* If supported
9 by substantial evidence, the ALJ's decision must be upheld, even
10 where the evidence is susceptible to more than one rational
11 interpretation. *Andrews*, 53 F.3d at 1039-40.

12 After summarizing medical records and testimony of medical
13 experts, the ALJ concluded that Plaintiff's only severe impairment
14 was neck, back and hip pain. He found there was "no evidence of
15 fibromyalgia syndrome," and that Plaintiff's depression was not a
16 severe mental impairment. (Tr. 31-32.) These findings are not
17 supported by substantial evidence.

18 **1. Step Two: Fibromyalgia and Depression**

19 To satisfy step two's requirement of a severe impairment, the
20 Plaintiff must provide medical evidence consisting of signs,
21 symptoms, and laboratory findings; the claimant's own statement of
22 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908.
23 The effects of all symptoms must be evaluated on the basis of a
24 medically determinable impairment which can be shown to be the cause
25 of the symptoms. 20 C.F.R. §§ 404.1529, 416.929. However, an
26 overly stringent application of the severity requirement violates
27 the statute by denying benefits to claimants who do meet the
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1 statutory definition of disabled. *Corrao v. Shalala*, 20 F.3d 943,
2 949 (9th Cir. 1994). Thus, the Commissioner has passed regulations
3 which guide dismissal of claims at step two. Those regulations
4 state an impairment may be found to be not severe *only* when evidence
5 establishes a "slight abnormality" on an individual's ability to
6 work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (*citing*
7 *Social Security Ruling (SSR)* 85-28). The ALJ must consider the
8 combined effect of all of the claimant's impairments on the ability
9 to function, without regard to whether each alone was sufficiently
10 severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991). An
11 impairment generally is considered non-severe for purposes of step
12 two if the degree of limitation in the three functional areas of
13 activities of daily living, social functioning, and concentration,
14 persistence or pace is rated as "none" or "mild" and there have been
15 no episodes of decompensation. 20 C.F.R. §§ 404.1520a(d)(1),
16 416.920a(d)(1). The step two inquiry is a *de minimis* screening
17 device to dispose of groundless or frivolous claims. *Bowen v.*
18 *Yuckert*, 482 U.S. 137, 153-154.

19 **a. Fibromyalgia Syndrome**

20 In 2004, fibromyalgia was described by the Ninth Circuit as a
21 "poorly understood disease" because its cause is unknown, and the
22 disease is diagnosed entirely on a patient's self-report of pain and
23 other symptoms, and there are no laboratory tests to confirm a
24 diagnosis. *Benecke v. Barnhart*, 379 F.3d 587, 589-90 (9th Cir.
25 2004); see also *Rollins v. Massanari*, 261 F.3d 853, 855 (9th Cir.
26 2001); *Lang v. Long-Term Disability Plan of Sponsor Applied Remote*
27 *Technology, Inc.*, 125 F.3d 794, 796 (9th Cir. 1997). "Common
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1 symptoms . . . include chronic pain throughout the body, multiple
2 tender points, fatigue, stiffness and a pattern of sleep disturbance
3 that can exacerbate the cycle of pain and fatigue associated with
4 this disease." *Benecke*, 379 F.3d at 590. Other Circuits also have
5 recognized fibromyalgia as a disabling impairment even though there
6 are no objective tests to confirm the disease or its severity. See
7 *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2nd Cir. 2003), *Sarchet*
8 *v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996).

9 As explained by Dr. Newton in his 2000 report, "Current
10 thinking is that fibromyalgia is a pain syndrome from muscle and
11 tendon similar to a head ache being from the head. It is likely,
12 although still debated, that the underlying tendon and muscle is
13 normal." (Tr. 325.) Regarding treatment, Dr. Newton stated,
14 "Available treatments at this time do include, non-narcotic
15 analgesics, muscle relaxants (Cyclobenzaprine or Methocarbamol),
16 sleeping aids (Trazodone, Imipramine, Doxapin, Amitriptyline),
17 Serotonin re-uptake inhibitors (even in the absence of depression),
18 reassurance, rest, and exercise is, of course, encouraged." (Id.)

19 Here, the record includes medical evidence that Plaintiff was
20 diagnosed with fibromyalgia in 1999 by her treating physician and
21 confirmed in 2000 by a rheumatology specialist. (Tr. 250, 325.)
22 However, the ALJ found that "both [non-examining] medical experts,
23 Dr. Spence and Dr. Stier, testified that there are no records
24 indicating a definitive diagnosis of fibromyalgia." (Tr. 31.) This
25 finding misstates the evidence. Dr. Spence simply did not recognize
26 fibromyalgia as a disease, stating, "My view is that fibromyalgia is
27 another name for chronic pain syndrome," and testified the only
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1 diagnosis he found, based on Plaintiff's symptoms, was under Listing
2 12.07 (*Somataform Disorders*). Significantly, he found Plaintiff met
3 the Listing for this impairment, indicating evidence of the severity
4 of her condition supported a finding of disability. (Tr. 864.)

5 Dr. Spence's formal diagnosis, which reflects the
6 misunderstanding noted by the *Benecke* court, conflicts with the
7 diagnosis by the examining rheumatology specialist and is not
8 supported by other evidence in the record; therefore, it is
9 insufficient to reject the treating and examining physicians'
10 diagnoses of fibromyalgia. *Andrews v. Shalala*, 53 F.3d 1035, 1043
11 (9th Cir. 1995); *Lester*, 81 F.3d 821, 830-31 (9th Cir. 1995); see also
12 20 C.F.R. § 404.1527(5)(a).

13 Contrary to the ALJ's finding, Dr. Stier testified
14 unequivocally that Plaintiff's symptoms met the criteria for
15 fibromyalgia. (Tr. 874.) He explained in detail that fibromyalgia
16 is "a diagnosis of exclusion" where no other cause for the symptoms
17 can be identified. (Tr. 874.) The record shows that Plaintiff
18 consistently exhibited the signs and symptoms of fibromyalgia and
19 met the criteria of the American College of Rheumatology. (Tr.
20 406.) The ALJ's conclusion that there was of no evidence of
21 fibromyalgia is not supported by substantial evidence. Because the
22 evidence clearly indicates the symptoms of fibromyalgia caused more
23 than a slight abnormality on Plaintiff's ability to work, the ALJ's
24 step two finding of no evidence of fibromyalgia is reversible error.
25 *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

26 **b. Depression**

27 The ALJ also made the step two finding that Plaintiff's
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1 depression caused no more than a *de minimis* limitation on her
2 ability to work. (Tr. 32.) The evidence shows Plaintiff carried a
3 diagnosis of depression throughout the record. In May of 2000, Dr.
4 Hemmerling diagnosed Plaintiff with depression, low energy and pain
5 and prescribed Wellbutrin. (Tr.266.) Based on interview and
6 objective testing, examining psychologist Dr. McKnight diagnosed
7 depressive disorder, NOS, in 2002, and in 2004, Dr. McRae diagnosed
8 Major Depression, recurrent and anxiety disorder, nos, and post
9 traumatic stress disorder. (Tr. 361-62, 401.) Dr. Stier testified
10 that emotional difficulties such as depression are among the
11 symptoms of fibromyalgia. (Tr. 875.) He noted that the mental
12 health counselors reported "significant depression." (Tr. 891.)
13 The ALJ is required to "consider observations by non-medical sources
14 as to how an impairment affects a claimant's ability to work."
15 *Sprague*, 812 F.2d at 1232. The consistent diagnosis of depression
16 by Plaintiff's treating physicians, counselors and examining
17 psychologists is substantial evidence of a claim that is not
18 "frivolous." *Webb*, 433 F.3d at 688. In addition, detailed records
19 of Plaintiff's treatment with anti-depressants, beginning in 2002,
20 and clinic notes by treating physicians, examining psychologists and
21 mental health counselors reporting signs and symptoms of depression
22 constitute substantial evidence that depression had more than a *de*
23 *minimus* effect on Plaintiff's ability to perform work on a regular
24 basis. *Id.* The ALJ's step two finding that her depression was not
25 severe is error.

26 **2. Rejection of Medical Opinions**

27 To reach his determination that Plaintiff was not disabled, the
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1 ALJ rejected the opinions of rheumatology specialist Dr. Newton,
2 treating physicians Hemmerling and Hindman, and examining
3 psychologist, Dr. McRae. (Tr. 31, 34-35.) Plaintiff argues these
4 opinions were improperly rejected.

5 As discussed above, the ALJ erred in finding no evidence of
6 fibromyalgia. Dr. Newton clearly stated: "Her diagnosis is
7 fibromyalgia." (Tr. 325.) Medical expert Dr. Stier concurred with
8 this diagnosis. (Tr. 874.) Dr. Newton's opinion is supported
9 laboratory test results that ruled out metabolic diseases and a
10 detailed report of his findings on examination, including the
11 following positive symptoms: poor sleep pattern, frequent headaches,
12 joint problems, chronic nausea and dry heaves, intermittent
13 constipation and diarrhea, chronic irregular menses. (Tr. 321-31.)
14 As a specialist, his opinions merit significant weight regarding
15 fibromyalgia. 20 C.F.R. § 404.1527(5)(a). The ALJ's failure to
16 give any reason for rejecting of Dr. Newton's diagnosis is legal
17 error.

18 The ALJ rejected Dr. Hemmerling's assessment of Plaintiff's
19 limitations because of a lapse in treatment records, a lack of
20 supporting medical evidence and inconsistency with the rest of the
21 record. (Tr. 34.) These reasons are not sufficiently specific or
22 legitimate to reject a treating physician's opinions. *Lester*, 81
23 F.3d at 831. The ALJ did not explain why a lapse in treatment
24 records would discredit a treating physician's opinion. Dr.
25 Hemmerling's opinions are consistent with Dr. Newton's report and
26 the opinions Dr. Hindman, who treated Plaintiff for over four years.
27 The ALJ also discounted Dr. Hemmerling's opinions because they were
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1 based on Plaintiff's subjective complaints. (Tr. 34.) As discussed
2 below, the ALJ's credibility findings are not supported by "clear
3 and convincing" reasons and therefore, not a basis for wholesale
4 rejection of medical opinions. See *Jones v. Heckler*, 760 F.2d 993,
5 997 (9th Cir. 1985) (credibility issues cannot be used to "insulate
6 ultimate conclusion regarding disability from review"). Finally,
7 the ALJ cites Dr. Stier's testimony as a basis of rejection. (Tr.
8 34.) However, Dr. Stier specifically endorsed Dr. Hemmerling's
9 opinion, stating the evidence indicated Plaintiff's worsening
10 condition would cause excessive absenteeism. (Tr. 879-80.) The ALJ
11 failed to explain why Dr. Stier's testimony that there "was no
12 neurologic impairment or any impairment supporting absenteeism of 4
13 times per month" (Tr. 34), is relevant in rejecting Dr. Hemmerling's
14 opinions regarding Plaintiff's limitations due to fibromyalgia. See
15 *Magallanes*, 881 F.2d at 755.

16 The ALJ rejected Dr. McRae's opinion that Plaintiff had marked
17 limitations in social functioning in favor of medical expert Dr.
18 Klein testimony, reasoning that Dr. McRae's evaluation "was for DSHS
19 purposes" which were "not as stringent as Social Security disability
20 evaluations, and are generally . . . based on a clamant's subjective
21 complaints." (Tr. 31.) However, the purpose for which an evaluation
22 is obtained does not provide a legitimate reason for rejection.
23 *Lester*, 81 F.3d at 832. The ALJ also cited examples of Plaintiff's
24 inconsistencies in treatment as reasons for discrediting Dr. McRae's
25 assessment. (Tr. 31.) The ALJ failed to explain how a patient's
26 missed counseling sessions and running out of medication are
27 legitimate reasons for rejecting a psychologist's opinions based on

1 clinical interview and objective testing. Further, the Ninth
2 Circuit has cautioned against chastising a person with mental health
3 problems for inconsistencies in treatment. See e.g. *Nguyen v.*
4 *Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

5 In rejecting Dr. Hindman's opinion that Plaintiff was unable to
6 work on a "reasonably continuous full time basis," the ALJ relied on
7 Dr. Klein's conclusion that Plaintiff scores indicated "gross
8 exaggeration," an interpretation of a personality testing score that
9 is unsupported by personal contact with Plaintiff or other evidence
10 from examining physicians and psychologists. (Tr. 35, 887.) The
11 ALJ also found Dr. Hindman's opinions were not consistent with the
12 bulk of the evidence, referencing records of ongoing treatment that
13 reflected "improvement in both subjective and objective complaints."
14 (Id.) These are neither specific or legitimate reasons for
15 rejection.

16 The record shows that although Dr. Hindman noted improvement in
17 Plaintiff's condition with treatment, he opined she could not work
18 on a "reasonably continuous full-time basis," citing problems caused
19 by pain and her need for frequent rest. (Tr. 356, 468, 658-59.)
20 This is consistent with Dr. Hemmerling's findings and with Dr.
21 Newton's assessment. (Tr. 316-27.) Other evidence noted Plaintiff
22 had good days and bad days, with fluctuating pain and depressive
23 symptoms. (Tr. 502, 605, 611, 617, 621, 641, 643.) "Occasional
24 symptom-free periods - and even sporadic ability to work - are not
25 inconsistent with disability." *Lester*, 81 F.3d at 833. Plaintiff's
26 reported quality of life improvement is not inconsistent with Dr.
27 Hindman's opinion regarding sustained work activity.

1 Contrary to the ALJ's finding that Dr. Hindman did not identify
2 "trigger points," used to diagnose fibromyalgia, the record includes
3 a June 19, 2001, examination report from Dr. Hindman documenting 17
4 of 18 trigger points, which verified the diagnosis consistent with
5 the American College of Rheumatology 1990 criteria. (Tr. 406.) Dr.
6 Stier referenced this trigger point evaluation in his testimony.
7 (Tr. 874.) The Commissioner's findings must be based on the record
8 in its entirety, not just "a specific quantum of supporting
9 evidence." *De Lorme v. Sullivan*, 924 F.2d 841, 846 (9th Cir. 1991).
10 Viewing the record in its entirety, Dr. Hindman's opinions are not
11 inconsistent with the bulk of the medical evidence.

12 The ALJ also relied on Dr. McKnight's single remark that
13 "iatrogenic issues must be considered." (Tr. 35.) He suggested Dr.
14 Hindman's opinions reflected a desire to be supportive of his
15 patient's wishes. (Id.) This skepticism, unsupported by any
16 evidence, is not a legitimate basis for rejecting a treating
17 physician's opinion. *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir.
18 1998); *Lester*, 81 F.3d at 833 (treating physician's continuing
19 relationship with a claimant renders him "especially qualified" to
20 form an overall conclusion as to the combined impact of a patient's
21 symptoms on his or her functional capacities); *Embrey v. Bowen*, 849
22 F.2d 418, 421 (9th Cir. 1988) (treating physician's opinions entitled
23 to special weight).

24 Dr. Hindman's conclusions are supported extensively by the
25 record in its entirety, including the opinions of treating physician
26 Dr. Hemmerling, Dr. Newton, Dr. McRae, and mental health providers.
27 The ALJ's reasons for rejecting these medical opinions are neither
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1 "clear and convincing" nor "specific and legitimate."

2 **3. Residual Functional Capacity**

3 At step four, the ALJ assessed Plaintiff's RFC and determined
4 she was capable of performing a significant range of light work.
5 (Tr. 38.) Because the ALJ improperly rejected Plaintiff's treating
6 and examining physicians' opinions regarding Plaintiff's
7 fibromyalgia and depression, the severity of these conditions and
8 attendant limitations, he failed to consider the impact of all
9 impairments, alone and in combination, on Plaintiff's RFC. 20 C.F.R.
10 §§ 404.1529 (d)(4), 416.929 (d)(4); 404.1523, 416.923.
11 Specifically, there was a failure to include symptoms of
12 fibromyalgia and depression, and Plaintiff's need for low stress
13 work where she could rest frequently, and the impact of worsening
14 symptoms that would cause absenteeism four times per month. (Tr.
15 38.) Having failed to include all limitations in his RFC findings,
16 the ALJ's step four and step five evaluations are not supported by
17 substantial evidence. *Embrey*, 849 F.2d at 422.

18 **B. Credibility**

19 A claimant's credibility is an appropriate factor considered in
20 the evaluation of medical evidence. *Webb*, 433 F.3d at 688. Because
21 the diagnosis of fibromyalgia depends primarily on a claimant's self
22 report, Plaintiff's credibility is a critical issue. On review, the
23 court reviews the Commissioner's determinations *de novo*. *McNatt v.*
24 *Apfel*, 201 F.3d at 1087. In *Thomas*, 278 F.3d at 958-959, the court
25 held in assessing credibility, the ALJ may consider the following
26 factors when weighing the claimant's credibility: the claimant's
27 reputation for truthfulness, inconsistencies either in her
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1 allegations of limitations or between her statements and conduct,
2 her daily activities and work record, and testimony from physicians
3 and third parties concerning the nature, severity, and effect of the
4 alleged symptoms. See also *Light v. Social Sec. Admin.*, 119 F.3d
5 789, 792 (9th Cir. 1997). The ALJ "must specifically identify the
6 testimony she or he finds not to be credible and must explain what
7 evidence undermines the testimony." *Holohan v. Massanari*, 246 F.3d
8 1195, 1208 (9th Cir. 2001)(citation omitted). If the ALJ's
9 credibility finding is supported by substantial evidence in the
10 record, the court may not engage in second-guessing. *Morgan*, 169
11 F.3d at 600. If there is no affirmative evidence that the claimant
12 is malingering, the ALJ must provide "clear and convincing" reasons
13 for rejecting the claimant's allegations regarding the severity of
14 symptoms. *Reddick*, 157 F.3d at 722.

15 Here, there is no evidence of malingering. The ALJ found
16 Plaintiff's subjective complaints regarding her limitations were
17 less than credible, reasoning that "the record does not contain
18 objective evidence to support" her claimed limitations or symptoms.
19 (Tr. 33.) As discussed above, Plaintiff's testimony was founded
20 upon objective medical evidence that established the existence
21 fibromyalgia, a condition that causes pain, fatigue and depression.
22 Plaintiff was assessed by a specialist and met the criteria for
23 fibromyalgia established by the American College of Rheumatology.
24 Plaintiff's complaints, which Dr. Spence observed had been present
25 since her alleged date of onset (see Tr. 867), are consistent with
26 a diagnosis of fibromyalgia. The ALJ also found Plaintiff's ability
27 to take care of her child, her home, walk to the store (three
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1 blocks), and participate in family activities inconsistent with her
2 reported level of pain and allegations of disability. (Tr. 33,
3 234.) A claimant does not have to "vegetate in a dark room" to be
4 considered disabled. *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.
5 1987). The Ninth Circuit has recognized that a claimant's attempt
6 to lead a normal life in the face of her limitations should not be
7 used against her in assessing credibility. *Id.* Plaintiff testified
8 that she received help from her family and spouse in her daily
9 activities, and she did her tasks a little at a time. (Tr. 232,
10 917.) Plaintiff's efforts to raise her child and keep a home at her
11 own pace, and with the help of her family, do not translate into an
12 ability to sustain work activities on a regular basis. *Fair v.*
13 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (home activities not easily
14 transferable to the workplace where medication and periodic rest may
15 be impossible).

16 The ALJ also reasoned that Plaintiff exhibited exaggerated
17 behavior in psychological testing, citing medical expert Dr. Klein's
18 conclusion that Plaintiff's psychological test results were
19 inconsistent with other medical evidence and self report. (Tr. 33,
20 888-89.) Although Dr. Klein interpreted one scale on the
21 personality test results as indicating gross exaggeration, the
22 record contains no evidence that either her examining psychologist
23 or treating physicians discounted her credibility. Further, Dr.
24 Klein acknowledged that the physicians who actually had extended
25 contact with Plaintiff did not report concerns that she was
26 exaggerating. (Tr. 891.) Likewise, there is no indication in
27 mental health records that Plaintiff's credibility was questioned.

1 As a non-examining psychologist, Dr. Klein's conflicting
2 interpretation of one segment of one test is given less weight than
3 the assessments of examining and treating physicians. 20 C.F.R.
4 §404.1527(d)(2). Therefore, this reason is not sufficiently "clear
5 and convincing" to discredit Plaintiff's testimony.

6 Contrary to the ALJ's credibility findings, conservative
7 treatment was ongoing and was consistent with the treating doctor's
8 recommendations and her pain management regime. She engaged in
9 exercise, mental health therapy as well as ongoing manipulations for
10 her rib problems. (See e.g., Tr. 332-48, 743-48.) The ALJ
11 referenced the use of manipulation and its benefits in his decision.
12 (Tr. 31, 875.) The record also indicates Plaintiff was worried her
13 prescription pain medication was not good for her and tended to
14 under-medicate; she was worried she would be perceived as narcotic
15 addicted. (Tr. 366.) Further, a variety of mental health matters
16 were addressed in the course of her therapy, including post-
17 traumatic stress, and her counselors consistently observed her to be
18 depressed and needing anti-depressants. Mental health providers
19 noted Plaintiff had fluctuating mood and energy levels, confirming
20 Plaintiff's allegations that she had good days and bad days. (Tr.
21 585, 596, 602-32.) The record in its entirety does not support the
22 ALJ's finding that Plaintiff is not credible.

23 **C. Remedy**

24 There are two remedies where the ALJ fails to provide adequate
25 reasons for rejecting the opinion of treating or examining
26 physicians. The general rule, found in the *Lester* line of cases, is
27 that "we credit that opinion as a matter of law." *Benecke v.*

1 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); see also *Lester*, 81 F.3d
2 at 834; *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9th Cir. 1996);
3 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); *Hammock v.*
4 *Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Under the alternate
5 approach found in *McAllister v. Sullivan*, 888 F.2d 599 (9th Cir.
6 1989), a court may remand to allow the ALJ to provide the requisite
7 specific and legitimate reasons for disregarding the opinion. See
8 also *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990) (*citing*
9 *McAllister*). The *McAllister* approach appears to be disfavored where
10 the ALJ fails to provide any reasons for discrediting a medical
11 opinion. See *Pitzer, supra*; *Winans v. Bowen*, 853 F.2d 643 (9th Cir.
12 1987).

13 Case law requires an immediate award of benefits when:

14 (1) the ALJ has failed to provide legally sufficient
15 reasons for rejecting [a medical opinion], (2) there are
16 no outstanding issues that must be resolved before a
17 determination of disability can be made, and (3) it is
clear from the record that the ALJ would be required to
find the claimant disabled were such evidence credited.

18 *Harman*, 211 F.3d at 1178 (*citing Smolen*, 80 F.3d at 1292).

19 Improperly rejected claimant testimony is also credited as
20 true. *Lester*, 81 F.3d at 834; *Varney v. Secretary of Health and*
21 *Human Services*, 859 F.2d 1396, 1401 (9th Cir. 1988)(*Varney II*). The
22 ALJ failed to consider Plaintiff's medically established
23 fibromyalgia and depression alone and in combination, and failed to
24 include credited limitations in his hypothetical question. When
25 presented with the improperly discredited limitation of absenteeism,
26 the vocational expert testified missing work four times per month
27 would preclude regular employment. (Tr. 879-80.) Because this
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1 testimony established Plaintiff's inability to work, there is no
2 utility to further proceedings. *Harman*, 211 F.3d at 1180; *Lewin v.*
3 *Schweiker*, 654 F.2d 631 (9th Cir. 1981) (remand for additional
4 proceedings would simply delay receipt of benefits).

5 The delay in Plaintiff's disability proceedings, which started
6 in 1999, has been severe; the case has been remanded two times by
7 the agency and heard by two ALJs at five hearings. Further, the
8 treating physicians' opinions are consistent and support Plaintiff's
9 allegations regarding her limitations and pain. Her complaints of
10 pain and fatigue are clearly associated with her diagnosed
11 fibromyalgia and depression. Crediting Plaintiff's improperly
12 rejected testimony and statements in treatment records as true, the
13 onset date is established as alleged. See e.g. *Hammock*, 879 F.2d at
14 503; *Varney II*, 859 F.2d at 1401.

15 The record is fully developed and there are no other issues to
16 be resolved; no useful purpose would be served by further
17 administrative proceedings. Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
20 **GRANTED** and this matter is remanded to the Commissioner for an
21 immediate award of benefits.

22 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
23 **DENIED;**

24 3. An application for attorney fees may be filed by separate
25 motion.

26 The District Court Executive is directed to file this Order and
27 provide a copy to counsel for Plaintiff and Defendant. Judgment
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1 shall be entered for Plaintiff and the file shall be **CLOSED**.

2 DATED July 23, 2007.

3
4 S/ CYNTHIA IMBROGNO
5 UNITED STATES MAGISTRATE JUDGE
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